Supreme Court, U.S.
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No. 94-1640

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

THE SHERWIN-WILLIAMS COMPANY,

Petitioner,

v.

EASTERN MOUNTAIN PLATFORM TENNIS, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO THE WRIT OF CERTIORARI

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SUMMARY OF ARGUMENT

The First Circuit's ruling on the procedural issue is consistent with and supported by the other circuit courts that have reviewed this issue. There is no conflict between the circuits on this issue and, further, this issue does not present a "special and important" question for review by this court.

The Sherwin-Williams Company ("Sherwin-Williams") concedes that the First, Sixth, and Federal Circuits support the proposition that a denial of summary judgment is not reviewable on appeal. Although Sherwin-Williams cites cases from the Second Circuit as supporting its position, a review of these cases reveals that the issue has not been squarely addressed by the Second Circuit, and thus, it does not provide any direct precedential authority. Although Sherwin-Williams cites the Seventh Circuit as supportive of its position, the leading cases in that circuit actually support and are consistent with the First Circuit's decision in this case. Similarly, the leading case in the Eleventh Circuit fails to articulate the distinction between law-based and fact-based summary judgment motions as argued by Sherwin-Williams. While Sherwin-Williams points to the Fifth, Ninth, and Tenth Circuits as internally inconsistent on the issue, the leading cases from these circuits that have addressed the issue have held consistent with the First Circuit's decision. The cases relied upon by Sherwin-Williams from these circuits do not specifically address the procedural issue. Therefore, as there is no conflict in the circuits for this court to resolve, *certiorari* should not be granted.

Regardless of the procedural issue, the First Circuit performed a thorough *de novo* review on the issue of the applicability of RSA 358-A. Thus, the issue of whether a denied summary judgment motion is reviewable on appeal is moot because the First Circuit nevertheless performed an exhaustive review of the state issue of statutory construction. Sherwin-Williams' claim that the First Circuit's review of the issue was lacking because of its failure to cite a particular recent case is dubious. The case of *Roberts v. General Motors Corp.*, 138 N.H. 532, 643 A.2d 956 (1994), was only remotely relevant, and moreover, the First Circuit's review of the state statute was multi-faceted, well-reasoned, and discussed the state law issue at length. Sherwin-Williams ignores the explicit language from the First Circuit's decision stating that it performed a *de novo* review of the law.

REASONS FOR NOT GRANTING THE WRIT

I. THE PROCEDURAL ISSUE RAISED BY THE PETITIONER IS NOT A "SPECIAL AND IMPORTANT" QUESTION THAT SHOULD RESULT IN A GRANT OF CERTIORARI

It is undisputed that Sherwin-Williams failed to move for judgment as a matter of law pursuant to Rule 50 of the Rules of Federal Civil Procedure at the close of the evidence. It is also undisputed that Sherwin-Williams' post-trial motion to set aside the jury verdict did not raise the

applicability of RSA 358-A as a ground to set aside the verdict.[1] This is not a trap for the unwary as suggested by Sherwin-Williams. (Petition at p.17). Rather, all counsel should well know that in order to preserve legal challenges to the judgment on appeal, motions under Rule 50 should be filed. Certainly, the fact that Sherwin-Williams may have found this general rule to be a "trap" does not raise a "special and important" question for which *certiorari* should be granted.

Sherwin-Williams argues that there is significant conflict between the circuits on this issue. A review of the cases cited in the petition, however, does not reveal such a conflict. Sherwin-Williams concedes at page 13 of its petition that the First, Sixth, and Federal Circuits support the proposition that a denial of summary judgment is a pretrial order that the case remains pending for trial and is not a judgment that is reviewable on appeal. *See Lama v. Borras*, 16 F.3d 473 (1st Cir. 1994); *Jarrett v. Epperly*, 896 F.2d 1013 (6th Cir. 1990); *Glaros v. H.H. Robertson Co.*, 797 F.2d 1564 (Fed. Cir. 1986), *cert. dismissed*, 474 U.S. 1072 (1987).

A. The Second Circuit

Sherwin-Williams cites two cases from the Second

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[1]In its motion to set aside, Sherwin-Williams argued that RSA 358-A:10 did not allow for the jury to find a violation of the statute and instead specified that the court rule and make findings on whether the statute was violated.

Circuit, *Savarin Corp. v. National Bank of Pakistan*, 447 F.2d 727 (2nd Cir. 1971), and *State of New York v. Nuclear Regulatory Commission*, 550 F.2d 745 (2nd Cir. 1977), which it argues expressly conflicts with the First Circuit's decision. While the court in *Savarin* found that a motion for summary judgment was properly denied, *Savarin Corp.*, 447 F.2d at 732, this case does not address whatsoever the specific issue of whether a summary judgment denial is reviewable without the filing of Rule 50 motions. In fact, since the *Savarin* decision is silent as to whether Rule 50 motions were filed in the case, it puts into serious question whether the Second Circuit was even faced with this issue. Similarly, the case of *State of New York v. Nuclear Regulatory Commission*, 550 F.2d at 745, does not specifically address the issue of whether a summary judgment denial is reviewable when there are no subsequent motions under Rule 50. In addressing whether there may be an interlocutory review of a denial of summary judgment, the court stated that such an order is ordinarily not reviewable until a final judgment has been rendered in the case. *Id.* at 759. This would appear to presume, however, that the requisite Rule 50 motions are filed and acted upon before appellate review may be obtained. Thus, despite Sherwin-Williams' statement that the Second Circuit provides precedential authority for its position, a review of the cases cited by Sherwin-Williams from the Second Circuit reveal that the issue has not been squarely addressed and does not provide any direct precedential authority.

B. The Seventh Circuit

The next circuit Sherwin-Williams cites as expressly conflicting with the First Circuit's decision are the cases from the Seventh Circuit. The law on this issue in the Seventh Circuit is articulated in the case of *Watson v. Amedco Steel, Inc.*, 29 F.3d 274 (7th Cir. 1994). The *Watson* court states, "[w]e by and large have followed the majority rules disfavoring review of summary judgment denials after trial,...we agree with the Tenth Circuit that the proper redress for the erroneous denial of summary judgment would not be through appeal of that denial but through subsequent motions for judgment as a matter of law and appellate review of those motions if they were denied." *Id.* at 278-79 *quoting in part, Whalen v. Unit Rig, Inc.*, 974 F.2d 1248, 1251 (10th Cir. 1992). The *Watson* court disavowed a previous contrary decision in *Trustees of Indiana University v. Aetna Casualty and Surety Co.*, 920 F.2d 429 (7th Cir. 1990), and stated that absent an extraordinary circumstance, the court will not review the denial of a motion for summary judgment after a full trial on the merits of a claim. *Watson*, 29 F.3d at 278. The *Watson* court explained that the extraordinary circumstance would be similar to the one encountered in *EEOC v. Sears, Roebuck & Co.*, 839 F.2d 302 (7th Cir. 1988), in which the plaintiff notified the court that it intended to abandon certain claims at trial if summary judgment as to those claims was denied. *Watson*, 29 F.3d at 278. Sherwin-Williams' suggestion at footnote seven of its petition that *Watson* applies only to

record-based summary judgment motions ignores the explicit language of the *Watson* decision as quoted above. Nowhere in the *Watson* decision is a distinction made between record-based and law-based summary judgment motions as Sherwin-Williams is attempting to delineate here. It is a rather long leap in interpretation for Sherwin-Williams to argue that its distinction between fact-based and law-based summary judgment motions constitutes an "extraordinary circumstance" as articulated by the Seventh Circuit in order to deviate from the general rule against review of summary judgment denials after trial.

C. The Eleventh Circuit

The next circuit that Sherwin-Williams cites as expressly conflicting with the First Circuit's decision is the Eleventh Circuit in the case of *Holley v. Northrop Worldwide Aircraft Services*, 835 F.2d 1375 (11th Cir. 1988). Somehow Sherwin-Williams at page 12 of its petition creates a new holding for *Holley* stating that "the Eleventh Circuit held that denied, law-based summary judgment motions should be reviewable after final judgment." A careful review of the *Holley* decision reveals that the court took particular note in stating, "we hold *only* that a party may not rely on the undeveloped state of the facts at the time he moves for summary judgment to undermine a fully-developed set of trial facts which militate against his case." (Emphasis added.) *Id.* at 1378. It is a somewhat blatant mis-cite for Sherwin-Williams to state that the *Holley* holding was

anything beyond the above-quoted passage. Interestingly, Sherwin-Williams does not mention *Holley's* citation to *Johnson v. Bryant*, 671 F.2d 1276 (11th Cir. 1982), a case that explained the appropriate redress for an erroneous denial of summary judgment. The *Holley* court stated that in *Johnson*, "the appellant did not rely on the initial motion for summary judgment, but instead made both a motion for a directed verdict and a motion for judgment notwithstanding the verdict, and appealed the denial of all three." *Holley*, 835 F.2d at 1378. Again, the distinction between law-based and fact-based summary judgment motions is not found anywhere within the *Holley* decision as purported by Sherwin-Williams.

In sum, the cases from the Second, Seventh, and Eleventh Circuits do not articulate a distinction between fact-based and law-based summary judgment motions as purported by Sherwin-Williams and a careful analysis of the holdings from these cases reveals that there is no express conflict with the First Circuit's decision. In fact, a careful reading of these cases shows that while the issue remains an open question in the Second Circuit, the Seventh and Eleventh Circuits are actually consistent with the First Circuit. Sherwin-Williams next attempts to demonstrate that three other circuits, the Fifth, Ninth, and Tenth, are internally inconsistent on the pertinent issue. Careful review of the cases from these circuits, however, demonstrates no particular inconsistency.

D. The Fifth Circuit

Sherwin-Williams cites to *Satcher v. Honda Motor Co.*, 984 F.2d 135 (5th Cir. 1993), *vacated*, 993 F.2d 56 (5th Cir. 1993), as the case from the Fifth Circuit that supports its position. While the court did review the denial of the defendant's motion for summary judgment, the court was quite careful to explain the procedural issue by stating that the defendant's motion for a new trial was understood by the trial judge to include a motion for JNOV that raised the argument that the defendant was entitled to summary judgment. *Id.* at 137 and n.1. The court noted that at the hearing on the motion for a new trial, the trial judge repeated and re-adopted his denial of the defendant's motion for summary judgment. The significance of this passage in the *Satcher* decision is the court's concern that the requisite Rule 50 motion was acted upon in order to allow appellate review of the legal issue. Since the *Satcher* court found that the trial judge, in fact, acted upon the requisite Rule 50 motion, *Satcher* does not stand for the proposition that a summary judgment denial is reviewable absent a Rule 50 motion, as suggested by Sherwin-Williams. The lead case on the issue at hand in the Fifth Circuit is *Black v. J.I. Case Co., Inc.*, 22 F.3d 568 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 579 (1994). *See also Roy B. Taylor Sales, Inc. v. Hollymatic Corp.*, 28 F.3d 1379, 1381 n.6 (5th Cir. 1994). In *Black*, the Fifth Circuit re-affirmed its rule announced in previous cases that orders denying summary judgment motions are not reviewable. *Black*, 22 F.3d at 571. The

court noted that it remained in harmony with the overwhelming majority of other circuits that have considered the issue. Apparently, Sherwin-Williams' argument that there should be a distinction between fact-based and law-based summary judgment motions evolves from a footnote to the *Black* decision.

Footnote five to the decision suggests that the *Holley* case from the Eleventh Circuit, discussed *supra* at p.6-7, *could be read* to support a dichotomy for motions denied on "factual" grounds and motions denied on "legal" grounds. The footnote suggests that the former type of motion would not be reviewable, whereas the latter type of motion would be reviewable. Although the *Holley* case did not actually draw this distinction, the footnote suggests that this is a possible interpretation of the *Holley* case. The footnote goes on to criticize the fashioning of this dichotomy due to the difficulty in distinguishing between "factual" and "legal" issues. The footnote points out that the court's ability to distinguish "factual" and "legal" issues will be hampered in the instances, which are not uncommon, where the district court gives no or only generalized reasons for denying the motion. The Fifth Circuit states that:

> such a dual approach would require us to craft a new jurisprudence based on a series of dubious distinctions between law and fact. And, such an effort--added to the tasks of already overburdened courts of appeal--would benefit only those summary judgment movants

> who failed to properly move for judgment as a matter of law at the trial on the merits. If such motions are properly made, the denied motion for summary judgment need not be reviewed, because the 'legal' issues determined by the district court are freely reviewable, and the case may be reversed and rendered on that basis.

Id. at n.5 (citations omitted).

Evidently, the only specific articulation of Sherwin-Williams' position is contained in a footnote from a Fifth Circuit case that is commenting upon a possible interpretation of an Eleventh Circuit case. Considering that Sherwin-Williams' position relative to the creation of a dichotomy between law-based and fact-based summary judgment motions exists in a single case in a lone footnote in a circuit whose leading authority takes the opposite position, it is rather absurd for Sherwin-Williams to argue that this is an important and recurring issue.

E. The Ninth Circuit

Sherwin-Williams moves to the Ninth Circuit and suggests that it is internally conflicted as well. Sherwin-Williams cites to *Wilson Arlington Co. v. Prudential Insurance Co.*, 912 F.2d 366 (9th Cir. 1990), as supportive of its position, but as with the other cited cases, the court does not even address the procedural issue of whether a summary judgment denial is reviewable. Moreover, since the

court does not state whether Rule 50 motions were filed, it cannot be determined whether the court even needed to address this issue. The cases that have specifically addressed the issue, *Lum v. City and County of Honolulu*, 963 F.2d 1167 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 659 (1992), and *Locricchio v. Legal Services Corp.*, 833 F.2d 1352 (9th Cir. 1987), have held that the denial of a motion for summary judgment is not reviewable on an appeal from a final judgment entered after a full trial on the merits. The *Locricchio* court noted that this was the majority rule and stated that, "[a]fter considerable research, we have found no case in which a jury verdict was overturned because summary judgment had been improperly denied." *Locricchio*, 833 F.2d at 1359. There does not appear to be any internal inconsistency in the Ninth Circuit. Rather, the Ninth Circuit has ruled consistently with the other circuits that have addressed this issue.

F. The Tenth Circuit

The final circuit that Sherwin-Williams points to as internally inconsistent is the Tenth Circuit. Sherwin-Williams cites to *Grubb v. Federal Deposit Insurance Corp.*, 868 F.2d 1151 (10th Cir. 1989), but this case makes no mention whatsoever of the procedural issue of the reviewability of summary judgment motions. The Tenth Circuit case that did review this specific issue cited to the various other circuits in adopting the rule that denial of summary judgment is not properly reviewable on an appeal from a final judgment

entered after trial. *Whalen v. Unit Rig, Inc.*, 974 F.2d 1248, 1250-51 (10th Cir. 1992). The *Whalen* court held that the proper redress is not through an appeal of the denial, but through subsequent motions for judgment as a matter of law and appellate review of those motions if they are denied. *Id.* at 1251. Apparently, the Tenth Circuit has now spoken on this issue as well.

It is unfortunate for Sherwin-Williams that it did not seek the proper redress for obtaining review of its denied motion for summary judgment, but the rules are put into place to be followed. While Sherwin-Williams may not favor the rule articulated by the First, Fifth, Sixth, Seventh, Ninth, Tenth, Eleventh and Federal Circuits, this is not a basis upon which this court should grant *certiorari*. At this point, there is no inconsistency among the circuits and all of the circuits that have specifically addressed the issue have agreed with the First Circuit's decision in this case. Essentially, Sherwin-Williams' petition attempts to unearth a few cases from a few circuits in which a summary judgment denial was reviewed, but the procedural question of whether the denial was reviewable was never specifically raised or addressed. Sherwin-Williams cites these cases as expressly supporting its position; however, the absence of any discussion from these cases on the procedural issue at hand suggests otherwise. As noted, *supra* p.9-10, the only articulation of Sherwin-Williams' contention of a dichotomy between law-based and fact-based summary judgment motions was a footnote from a Fifth Circuit case that supported the majority

rule and expressly criticized such a dichotomy. The claim that this rises to the level of a conflict between the circuits is overreaching, particularly where the conflict is non-existent. Therefore, as there is no conflict in the circuits for this court to resolve, *certiorari* should not be granted.

II. THE PETITIONER'S REQUEST FOR CERTIORARI IS BASED ON THE FALSE ASSUMPTION THAT THE FIRST CIRCUIT DID NOT CONDUCT AN APPROPRIATE REVIEW OF RSA 358-A

Sherwin-Williams seizes upon an issue of waiver under Rule 50 in order to claim that the substantive issue involving the applicability of a New Hampshire state statute, RSA 358-A, was not given the appropriate review. Sherwin-Williams is apparently unwilling to hear or believe the First Circuit when it states that despite Sherwin-Williams' waiver of its right to appeal the applicability of RSA 358-A, it nevertheless reviewed the issue of state law on a *de novo* basis. (Petition App. at 5a). Even more stupefying is Sherwin-Williams' claim that the insufficiency of the First Circuit's review is demonstrated by its failure to cite a particular case, *Roberts v. General Motors Corp.*, 138 N.H. 532, 643 A.2d 956 (1994), (Petition at p.8), that, at best, was only remotely relevant. Either Sherwin-Williams is ignoring what the First Circuit stated it did relative to its review of RSA 358-A, or it is criticizing qualitatively the analysis set forth by the First Circuit in reviewing RSA 358-A. Neither ignorance nor presumptuous criticism of the First Circuit should form the basis of a request for review to the

highest court of this land.

The First Circuit's review of the state statute was multi-faceted, well-reasoned, and discussed the state law issue in depth for several pages of its decision. The First Circuit performed a careful analysis of the statute's various provisions by considering the plain meaning of the words. (Petition App. at 5a). The First Circuit considered supportive decisions of the New Hampshire Supreme Court that consistently applied RSA 358-A in a broad manner. (Petition App. at 7a). The First Circuit also considered decisions of the lower courts of New Hampshire, a significant majority of which supported the application of RSA 358-A argued by Eastern Mountain Platform Tennis, Inc.[2] Sherwin-Williams conspicuously failed to cite all of the lower court decisions, (Petition at p.5), giving the false impression that the First Circuit failed to recognize a majority in Sherwin-Williams' favor. Inexplicably, Sherwin-Williams made the same mistake in their brief to the First Circuit, but fortunately, the First Circuit's review was thorough enough to recognize this error and cited to all of the lower court cases. (Petition App. at 8a). The Court at footnote three of its decision, (Petition App. at 8a), further noted that a lower court judge changed her view after the New Hampshire Supreme Court held that RSA 358-A applied broadly to a wide array of prospective plaintiffs in the case of *Gilmore v. Bradgate Assoc.*, 135

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[2]Eastern Mountain Platform Tennis, Inc., represents that it has no parent companies or subsidiaries as required by Supreme Court Rule 29.1.

N.H. 234, 604 A.2d 555 (1992).

The First Circuit also considered the fact that federal judges ruling on the issue have uniformly concluded that the state statute applied to commercial transactions. (Petition App. at 8a). While noting that there was a "dearth" of case law to support Sherwin-Williams' position, the First Circuit still addressed and distinguished cases and arguments raised by Sherwin-Williams as analogous. For example, the First Circuit found that the case of *Chase v. Dorais*, 122 N.H. 600, 448 A.2d 390 (1982), cited by Sherwin-Williams as a leading authority for their argument, was limited to strictly private transactions between individuals and, thus, was not relevant to the issue at hand in this case. (Petition App. at 9a). While Sherwin-Williams argued that RSA 358-A should be interpreted similar to the Massachusetts Consumer Protection Act (Mass. Gen. L. ch. 93A), the First Circuit responded that Sherwin-Williams' argument was based on a myopic view of the history of the Massachusetts statute, ignored the fact that the New Hampshire statute did not contain similar restrictions, and pointed out that New Hampshire instead opted for broad applicability in all commerce and trade. (Petition App. at 9a). The First Circuit further noted that the title of the state act need not be considered since there was no ambiguity in the plain language of the statute. (Petition App. at 10a). Finally, the First Circuit noted that from a policy standpoint deceptive practices between a producer and manufacturer can have a significant impact on consumer welfare. (Petition App. at

10a).

Despite the First Circuit's detailed review of the state statute, Sherwin-Williams now claims that the review was lacking because the court did not address a case submitted by Sherwin-Williams as a supplemental authority. While this case did not address the issue raised on appeal, the applicability of RSA 358-A to commercial transactions, it has now become the *piece de resistance* of Sherwin-Williams' argument that the First Circuit's review was lacking. *Roberts v. General Motors*, 138 N.H. 532, 643 A.2d 956, involved a claim of disappointed expectations by a party who was not awarded an automobile franchise dealership. With respect to RSA 358-A, the court held that the plaintiff's claim did not fall within any of the types of acts particularized within the statute. In the instant case, Eastern Mountain alleged and the jury and District Court found acts involving misrepresentations of Sherwin-Williams that constituted particular violations of RSA 358-A:2(V and VII). In light of this, it is rather absurd for Sherwin-Williams to argue that the failure to cite this remotely relevant case evidences the First Circuit's less than searching review. The more likely reason this case was not cited is because the First Circuit did not need or care to respond to Sherwin-Williams' attempt to grasp at an insignificant authority in order to support a position that lacked precedence.

Essentially, Sherwin-Williams seeks to have this Court and the respondent spend an enormous amount of time

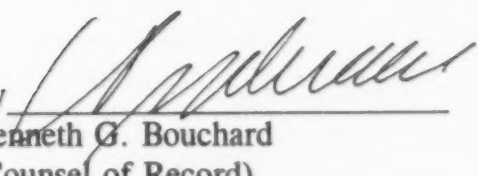
and effort to obtain federal review of a state statute that has already been exhaustively reviewed by the First Circuit. If this Court were to grant *certiorari* and ultimately rule in favor of Sherwin-Williams' appeal that it did not procedurally waive the issue of the applicability of the state statute, the case would theoretically be remanded to the First Circuit in order to review the non-waived substantive issue of the applicability of RSA 358-A. It cannot be stated with any more emphasis that there is absolutely nothing further the First Circuit can substantively discuss beyond what it has already discussed. The most that Sherwin-Williams can point to is one case more that the First Circuit should consider, but the *Roberts* case clearly is not an authority on all fours that will affect the First Circuit's decision. Indeed, *Roberts* is more supportive of Eastern Mountain's position. The *Roberts* court stated that RSA 358-A is a comprehensive statute whose language indicates that it should be given broad sweep. *Roberts*, 138 N.H. at 538, 643 A.2d at 960. Thus, *Roberts* supports the interpretation that the statute was intended to apply to business consumers. If the First Circuit had ruled that this issue was waived and then performed a perfunctory "plain error" review of the substantive issue, then perhaps Sherwin-Williams might have a legitimate dispute. (But see arguments relative to the non-existent split in the circuits, *supra* at p.2-13). In this case, however, Sherwin-Williams' argument flies in the face of the decision of the First Circuit and asks this Court to ignore the review the First Circuit specifically stated it was performing, and

what it did perform, a *de novo* review of the law. Rather than articulating a substantial and fundamental basis for this Court to hear this dispute, Sherwin-Williams appears to be merely unhappy with the result of the First Circuit's thorough analysis of the state statute. That is not a basis for granting *certiorari*.

III. CONCLUSION

Therefore, for the above reasons, the respondent respectfully requests that the petition for a writ of certiorari be denied.

Respectfully submitted,



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